

criminal procedure  
monograph series  
1-8



*Probation  
Revocation,  
Third Edition*



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# **Monograph 7: Probation Revocation**

## **Third Edition**

Criminal Procedure Monograph Series 1–8

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**Michigan Judicial Institute**

**By Tobin L. Miller, J.D.**

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The research done on this monograph is current through December 1, 2005. This monograph is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

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Criminal Procedure Monograph 7: *Probation Revocation (Third Edition)* supersedes the revised edition of this monograph, published in 2002. This edition brings up to date the applicable statutes, court rules (including amendments to the rules governing criminal procedure effective January 1, 2006), and case law.

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<b>Part A—Commentary.....</b>	<b>2</b>
7.1 Proceedings Discussed in This Monograph.....	2
7.2 Rules Applicable to Probation Revocation Proceedings.....	3
A. Proceedings Involving Adults.....	3
B. Proceedings Involving Juveniles.....	4
7.3 Conduct That Constitutes a Probation Violation .....	5
7.4 Issuance of Warrant or Summons.....	7
7.5 Time Requirements for Commencing Revocation Proceedings .....	8
7.6 Summary of Arraignment Procedures.....	9
7.7 Probationer's Right to Written Notice of the Alleged Violation .....	10
7.8 Contents of the Written Notice of Alleged Violation .....	10
7.9 Timeliness of the Written Notice of Alleged Violation.....	11
7.10 Waiver of the Right to Timely Notice by Pleading Guilty.....	12
7.11 Notice of the Right to a Contested Hearing.....	12
7.12 Probationer's Right to Counsel at Probation Revocation Proceedings.....	13
7.13 Requirements for a Valid Waiver of Counsel .....	13
7.14 Advice of Right to Counsel Must Be Given Before Each Subsequent Proceeding.....	14
7.15 Time Requirements and Release Pending a Contested Hearing ....	14
7.16 Time Requirements for Contested Hearings When Violation Is Based on a Criminal Offense .....	15
7.17 Time Requirements and Preliminary "Probable Cause" Hearings ...	16
7.18 Summary of Rules Governing Contested Hearings .....	17
7.19 Judges Who May Preside Over Revocation Proceedings .....	18
7.20 Presentation of Evidence at Contested Hearings .....	20
7.21 Burden of Proof at Contested Hearings .....	22
7.22 Required Findings of Fact and Conclusions of Law.....	22
7.23 Nonexistent Condition as a Defense to an Alleged Probation Violation .....	23
7.24 Lack of Notice of Condition as a Defense to Revocation .....	23
7.25 Summary of Procedures for Accepting Guilty and <i>Nolo Contendere</i> Pleas .....	23
7.26 Advice of Rights and Understanding, Voluntary, and Knowing Waiver of Rights .....	24
7.27 Establishing Factual Support for the Plea .....	25
7.28 Withdrawal of Guilty Plea .....	26
7.29 Alternatives Following a Finding of Probation Violation .....	27
7.30 Revocation of "Juvenile Probation" .....	29
7.31 Summary of Required Procedures for Imposing Sentence Following Revocation of Probation.....	31
7.32 Receiving an Updated Presentence Report.....	31
7.33 Required Procedures at the Sentencing Hearing.....	32

7.34	Responding to Challenges to the Presentence Report.....	33
7.35	Granting Credit for Time Served .....	34
7.36	Sentencing the Probationer When Uncounseled Misdemeanor Convictions Are Involved .....	36
7.37	Indigent Probationers May Not Be Incarcerated for Failure to Pay Fines, Costs, or Restitution.....	38
7.38	Advice of Right to Appeal or File Application for Leave to Appeal.....	39
<b>Part B—Quick Reference Materials .....</b>		<b>40</b>
7.39	How to Use the Flowchart and Checklists .....	40
7.40	Probation Revocation Flowchart	
7.41	Checklist 1: Arraignment	
7.42	Checklist 2: Guilty Plea	
7.43	Checklist 3: Contested Hearing	
7.44	Checklist 4: Sentencing	

## Part A—Commentary

### 7.1 Proceedings Discussed in This Monograph

This monograph discusses the procedures for conducting probation revocation proceedings. Rules governing the imposition of probation are briefly discussed only when relevant to revocation of probation. See generally MCL 771.1–771.3c. A defendant has no right to a hearing for a violation of a condition of a delayed sentence. *People v Coleman*, 130 Mich App 639, 642 (1983). However, a youthful trainee may be entitled to a hearing before youthful trainee status may be revoked. MCL 762.12, *People v Cochran*, 155 Mich App 191, 193 (1987), *People v Roberson*, 22 Mich App 664, 668–69 (1970), and *People v Webb*, 89 Mich App 50, 53 (1979).

This monograph also discusses the required procedures for revoking “juvenile probation” in “automatic waiver” cases. Juveniles may be placed on probation following conviction in “automatic waiver,” “traditional waiver,” and “designated” proceedings. The rules governing probation revocation proceedings in “automatic waiver” cases are discussed in this monograph. The rules governing adult probation revocation proceedings apply to juveniles placed on probation following conviction in “traditional waiver” proceedings. The rules governing probation revocation proceedings in “designated” cases are similar to those in “automatic waiver” cases but are not discussed in this monograph. See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJJ, 2003), Sections 22.5–22.8.

Following conviction in “automatic waiver” proceedings, a juvenile may be sentenced as an adult or placed on “juvenile probation” and committed to the Department of Human Services (DHS)\* as a public ward. MCL 769.1(3)–(4)

\*Formerly the  
Family  
Independence  
Agency (FIA).

and MCR 6.931(C). Unlike cases involving adults, commitment to the DHS is accompanied by placement of the juvenile on “juvenile probation” for the duration of the commitment. *People v Stanley*, 207 Mich App 300, 305–06 (1994). The juvenile may be confined or on supervised release during the period of “juvenile probation.” MCR 6.931(F)(1)–(11) limit the court’s authority to impose certain probation conditions on the juvenile that may be imposed in a case involving an adult.

## 7.2 Rules Applicable to Probation Revocation Proceedings

### A. Proceedings Involving Adults

In cases involving adults, MCL 771.4 contains the general standard for probation revocation. This statute provides the sentencing court broad discretion to revoke probation:

“It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer’s part for which the court determines that revocation is proper in the public interest. . . .”

MCL 771.4 also provides general procedural guidance for probation revocation proceedings:

“Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court’s discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer as the court determines best serves the



public interest. If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made. . . .”

MCR 6.445 sets forth the required procedures for probation revocation proceedings in felony cases involving adults. MCR 6.001(A). In misdemeanor cases, MCR 6.445(A)–(G) apply. MCR 6.001(B). The required procedures contained in MCR 6.445 are discussed in detail throughout this monograph.

Although probation violation hearings are summary and not subject to the same rules of pleading and evidence as apply to criminal trials, probationers are entitled to certain due process protections because of the potential loss of liberty. *People v Pillar*, 233 Mich App 267, 269 (1998). In general, due process requires that the proceedings consist of 1) a factual determination that the probationer has in fact violated a condition of probation, and 2) a discretionary determination of whether the violation warrants revocation of probation. *People v Laurent*, 171 Mich App 503, 505 (1988).

The particular due process protections applicable to probation revocation proceedings were set forth in *Gagnon v Scarpelli*, 411 US 778 (1973):

“(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body. . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.” *Id.* at 786, quoting *Morrissey v Brewer*, 408 US 471, 486 (1972).

## B. Proceedings Involving Juveniles

MCL 771.4 does not apply to juveniles who have been convicted following “automatic waiver” proceedings. Instead, MCL 771.7 governs probation violations committed by such juveniles. This statute requires revocation of “juvenile probation” and imposition of an adult sentence if the juvenile is convicted of a felony or misdemeanor punishable by more than one year’s imprisonment. See also MCR 6.933(B)(1)(a). When a juvenile who was placed on “juvenile probation” and committed to public wardship is alleged to have violated conditions of that probation, the court must proceed as provided in MCR 6.445(A)–(F). MCR 6.933(A). In addition, MCR 6.445(G) applies to the sentencing of a juvenile following revocation. MCR 6.933(B)(3). MCR 6.445(H), which provides for notice of rights to appeal

following revocation of probation, does not apply to “juvenile probation” revocation proceedings.

## 7.3 Conduct That Constitutes a Probation Violation

MCL 771.4 provides the sentencing court with broad discretion to revoke probation. That statute states in relevant part:

“If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court may revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer’s part for which the court determines that revocation is proper in the public interest. . . .”

### 1. Mandatory or Discretionary Probation Conditions

MCL 771.3(1) contains required probation conditions, MCL 771.3(2) contains conditions that may be in a probation order, and MCL 771.3(3) allows the court to “impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper.” “Other lawful conditions” must be rationally related to the rehabilitation of the offender. *People v Miller*, 182 Mich App 711, 713 (1990). See also *People v Higgins*, 22 Mich App 479, 482 (1970) (condition prohibiting probationer from playing collegiate or professional basketball would impede rather than promote his rehabilitation), and *People v Bobek*, 217 Mich App 524, 532 (1996) (discharge of youthful trainee after only 28 days on probation was unrelated to her rehabilitation, where the press discovered her youthful trainee status).

A probation condition prohibiting “antisocial conduct” is not impermissibly vague if specific examples of prohibited conduct are set forth in the probation order or explained to the probationer. *People v Bruce*, 102 Mich App 573, 576–80 (1980).

Where the court has properly ordered incarceration as a condition of probation, probation may be revoked for violation of other conditions of probation while the probationer is incarcerated. *People v Smith*, 69 Mich App 247, 249 (1976).

## 2. New Criminal Charges or Convictions

MCL 771.3(1)(a) requires a sentence of probation to include the following condition:

“During the term of his or her probation, the probationer shall not violate any criminal law of this state, the United States, or another state or any ordinance of any municipality in this state or another state.”

\*See Section 7.21 for further discussion of the standard of proof in probation revocation hearings.

Probation may not be revoked solely on the basis that the probationer was arrested for an alleged new criminal offense. *People v Pillar*, 233 Mich App 267, 269–70 (1998). Nonetheless, because of different standards of proof in criminal and probation revocation proceedings, a conviction of a new offense is not a prerequisite for revocation of probation based on the conduct underlying that offense. *People v Buckner*, 103 Mich App 301, 303 (1980).\* As stated in *People v Johnson*, 191 Mich App 222, 226 (1991):

“Because of the limited nature and scope of a probation violation hearing, as a practical matter the prosecutor may not present all the evidence bearing on the commission of the alleged offense. The determination whether one committed an offense for the purpose of a new conviction should be made in a criminal trial, which is the intended forum for such a determination, and not in an informal, summary proceeding.”

The Court in *Johnson* therefore held that a finding of no probation violation did not preclude a criminal trial where the same criminal conduct was at issue in both proceedings. *Id.*

The court must revoke probation if the probationer willfully violates the Sex Offenders Registration Act, MCL 28.721 et seq. MCL 771.4a.

## 3. Conduct That Occurs Before Commencement of Probationary Sentence

Michigan appellate courts have not decided whether probation may be revoked for conduct that occurs after conviction but before commencement of the probation period. The United States Court of Appeals for the Sixth Circuit, interpreting the federal probation statute, has held that probation may be revoked based on the probationer’s conduct that occurs after imposition but before commencement of the probationary sentence, but not for conduct that occurs prior to imposition of the probationary sentence. *United States v Twitty*, 44 F3d 410, 413 (CA 6, 1995) (because a condition of bond pending sentencing forbidding defendant from engaging in criminal conduct did not provide notice of a condition of probation subsequently imposed forbidding such conduct, defendant did not have fair notice of the probation condition when engaging in the criminal conduct prior to imposition of sentence), and

*United States v Williams*, 15 F3d 1356, 1358–60 (CA 6, 1994) (although the sentencing court did not have authority to issue a warrant for probation violation prior to the probationary period, the court did have authority to revoke probation for conduct occurring after imposition but before commencement of the probation period). The relevant statute, 18 USC 3565(a), allows a court to revoke probation “[i]f the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation . . . .” Michigan’s revocation statute, MCL 771.4, allows for revocation for violations “during the probation period . . . .”

## 7.4 Issuance of Warrant or Summons

MCR 6.445(A) states in part:

**“(A) Issuance of Summons; Warrant.** On finding probable cause to believe that a probationer has violated a condition of probation, the court may

“(1) issue a summons in accordance with MCR 6.103(B) and (C) for the probationer to appear for arraignment on the alleged violation, or

“(2) issue a warrant for the arrest of the probationer.”

MCR 6.103(B) and (C) deal with the form and service requirements of summonses. These rules state as follows:

**“(B) Form.** A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place.

**“(C) Service and Return of Summons.** A summons may be served by

“(1) delivering a copy to the named individual; or

“(2) leaving a copy with a person of suitable age and discretion at the individual’s home or usual place of abode; or

“(3) mailing a copy to the individual’s last known address.

“Service should be made promptly to give the accused adequate notice of the appearance date. The person serving the summons must make a return to the court before which the person is summoned to appear.”

MCR 6.445(A)(1) does not require that the summons be issued in accordance with MCR 6.103(A), which states that the court may issue a summons in a felony case only “[i]f the prosecution so requests.” Therefore, the court may issue a summons for any probation violation, and a request by a probation officer would be sufficient to cause the court to issue a summons. See 1989 Staff Comment to MCR 6.445.

The issuance of a petition to revoke probation and a warrant for probationer’s arrest pursuant to MCR 6.445(A) is justified when, during the period of probation, the sentencing court finds probable cause to believe that probationer has violated his or her probation. *People v Ritter*, 186 Mich App 701, 708 (1991).

The court must exercise its discretion when determining whether probable cause exists to believe that the probationer has violated a condition of probation. *People v Farmer*, 193 Mich App 400, 403 (1992). However, if a new criminal offense is the basis for the alleged probation violation, the prosecuting attorney alone may decide whether to proceed with a petition to revoke probation. In *People v Williams*, 186 Mich App 606, 613 (1990), the Court of Appeals stated:

“[T]he decision whether to proceed with a probation revocation petition on the basis of subsequent criminal conduct, to charge a defendant with that subsequent criminal conduct, or both, lies within the discretion of the prosecuting attorney. The judiciary has no authority to invade the prosecuting attorney’s discretion in this matter beyond its normal roles of probable cause determinations and, at trial, determination of guilt or innocence.”

A peace officer may also arrest a probationer without a warrant when the officer has probable cause to believe that the probationer has violated a probation condition. MCL 764.15(1)(g).

## 7.5 Time Requirements for Commencing Revocation Proceedings

The final paragraph in MCR 6.445(A) states that “[a]n arrested probationer must promptly be brought before the court for arraignment on the alleged violation.”

Due process requires that authorities exercise due diligence between the time of an alleged probation violation and issuance of an arrest warrant, *People v Miller*, 77 Mich App 381, 384 (1977), and between the time of the issuance of an arrest warrant and execution of the warrant, *People v Diamond*, 59 Mich App 581, 586–87 (1975), aff’d after remand 70 Mich App 512 (1976). If the authorities do not exercise due diligence, a probation violation may be waived. *People v Ortman*, 209 Mich App 251, 254 (1995). To determine

whether authorities acted with due diligence, the sentencing court should consider the length of the delay, the reason for the delay, and the prejudice to defendant. *Ortman, supra* at 255, citing *Miller, supra*. In *People v Phillips*, 109 Mich App 535, 540–41 (1981), the Court of Appeals found that a 108-day delay between a *nolo contendere* plea to a new offense and the date of arraignment for the related probation violation did not prejudice the probationer since the authorities were waiting to see if the probationer successfully completed a drug rehabilitation program. In *Miller, supra* at 385, the Court found no prejudice where the authorities delayed revocation proceedings until after the probable cause hearing on the underlying offense and the probationer was free on bond during the period of delay.

Because the sentencing court loses jurisdiction over the probationer when the probation period ends, proceedings for revocation of probation must be commenced prior to expiration of the probation period. *People v Wakefield*, 46 Mich App 97, 100 (1975). The sentencing court retains jurisdiction to revoke the probationer’s probation if revocation proceedings are commenced within the probation period and are pending when the probation period expires. *People v Ritter*, 186 Mich App 701, 706 (1991). Revocation proceedings commence upon the court’s issuance of a warrant or summons. See *Id.* at 708–09. See also *Id.* at 708, n 2 (to avoid situations where the probationer violates a condition of probation so near the end of the probation period that the court has no time to determine probable cause, “a better rule might be to require that the petition to revoke be filed within a reasonable time after the violation is committed, even if the period of probation has expired”). When a probationer absconds from probationary supervision, the probation period is tolled from the time an arrest warrant is issued until the time the probationer is returned to the court’s supervision. *Id.* at 711–712. In such cases, the court may amend the petition after the probation period has expired to allege violations that occurred during the probation period. *Id.* at 709–710.

## 7.6 Summary of Arraignment Procedures

MCR 6.445(B) states:

**“(B) Arraignment on the Charge.** At the arraignment on the alleged probation violation, the court must:

“(1) ensure that the probationer receives written notice of the alleged violation,

“(2) advise the probationer that

(a) the probationer has a right to contest the charge at a hearing, and

(b) the probationer is entitled to a lawyer’s assistance at the hearing and at all subsequent court

proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one,

“(3) if requested and appropriate, appoint a lawyer,

“(4) determine what form of release, if any, is appropriate, and

“(5) subject to subrule (C), set a reasonably prompt hearing date or postpone the hearing.”

These procedures are discussed in detail in the succeeding sections.

## **7.7 Probationer’s Right to Written Notice of the Alleged Violation**

MCL 771.4 states that the probationer is “entitled to a written copy of the charges constituting the claim that he or she violated probation.” A probationer has a due process right to written notice of charged violations. *Gagnon v Scarpelli*, 411 US 778, 782 (1973), and *People v Henry*, 66 Mich App 394, 397 (1976). See also *People v Councell*, 194 Mich App 192, 194 (1992) (where the court purported to revoke probation due to the probationer’s refusal to sign the probation order, the court was required to provide the probationer with written notice of the charge before revoking probation).

## **7.8 Contents of the Written Notice of Alleged Violation**

A notice of probation violation need not be as specific as an indictment or information, but it should allege facts sufficient to give notice of the claimed violation that, if proved, would constitute a violation of the terms and conditions of probation. The notice should refer to the specific conditions violated as well as the date and events supporting the charge. *People v Hunter*, 106 Mich App 821, 826 (1981). See, e.g., *People v Cammon*, 61 Mich App 315 (1975) (where the probationer was sentenced to one year in a probation camp as a condition of probation, the notice stating that he was expelled from that camp was adequate).

Probation may be revoked only for violations charged in the notice of probation violation. *People v Hall*, 138 Mich App 86, 93 (1984). In addition, probation may not be revoked for violating conditions that were stated orally on the record at defendant’s sentencing on the original offense, but which were not included in the written probation order. *People v Hill*, 69 Mich App 41, 44–45 (1976).

## 7.9 Timeliness of the Written Notice of Alleged Violation

MCR 6.445(B)(1) requires the court to give the probationer written notice of the alleged probation violation at the time of the arraignment. However, when the arraignment and revocation hearing are conducted on the same day, the issue of the timeliness of the notice arises. As a matter of procedural due process, “notice must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded.” *People v Gulley*, 66 Mich App 112, 116 (1975), quoting *In re Gault*, 387 US 1, 33 (1967).

Although providing notice minutes prior to or at a revocation hearing has been held untimely, in other cases the timeliness of notice is a function of the existence of a viable defense and the complexity of issues to be addressed at the hearing. *People v McNeil*, 104 Mich App 24, 28–29 (1981). The following cases illustrate these rules:

- 1) Notice provided to the probationer at the revocation hearing itself is not timely. *People v Lawrence*, 90 Mich App 73, 76–77 (1979).
- 2) Notice provided to the probationer 15 minutes before the revocation hearing is insufficient. *People v Gillman*, 71 Mich App 374, 377 (1976).
- 3) Notice provided to the probationer on the same day as the revocation hearing is insufficient where the alleged conduct did not involve conviction of a new crime, and where the charged violation cannot be disputed without gathering witnesses and preparing a substantial defense. *People v Bell*, 67 Mich App 351, 354 (1976), *People v Radney*, 81 Mich App 303, 307 (1978), *People v Ojaniemi*, 93 Mich App 200, 202–04 (1979), and *Gulley*, *supra* at 117.
- 4) Notice provided to the probationer one day before the revocation hearing is sufficient where the alleged violation was the probationer’s conviction of a new crime. *People v Irving*, 116 Mich App 147, 152–53 (1982).
- 5) Notice provided to the probationer one day before the revocation hearing is sufficient where the alleged violation involves simple factual issues, such as failure to report to the probation officer. *McNeil*, *supra* at 27–29, *People v Duncan*, 154 Mich App 652, 654 (1986), *People v Hanson*, 178 Mich App 507, 510–11 (1989), and *People v Broadnax*, 98 Mich App 338, 340 (1980).



## 7.10 Waiver of the Right to Timely Notice by Pleading Guilty

It is unclear whether the probationer “waives” a claim of insufficient notice by pleading guilty to a probation violation. Panels of the Court of Appeals have split on this question, and it has not been decided by the Supreme Court. See *People v Bell*, 67 Mich App 351, 354 (1976) (guilty plea waives untimely notice), *People v Duncan*, 154 Mich App 652, 653 (1986) (guilty plea does not waive untimely notice), and *People v Hanson*, 178 Mich App 507, 509 (1989) (opinion of Maher, J). The Court of Appeals is more inclined to find a waiver when the probationer was represented by counsel and had no defense to factually uncomplicated charges. See, e.g., *People v Broadnax*, 98 Mich App 338, 340 (1980), *People v McNeil*, 104 Mich App 24, 28–29 (1981), and *Duncan*, *supra* at 654. On the other hand, the Court of Appeals has found no waiver of the right to timely notice of charges where notice was given on the same day as the revocation hearing or at the revocation hearing, and where the probationer waived assistance of counsel before pleading guilty. See e.g., *People v Ojaniemi*, 93 Mich App 200, 202–04 (1979), and *People v Lawrence*, 90 Mich App 73, 76–77 (1979).

## 7.11 Notice of the Right to a Contested Hearing

MCR 6.445(B)(2)(a) states that at the arraignment, the court must advise the probationer of his or her “right to contest the charge at a hearing.” The record must reflect that the probationer was made aware of his or her right to a contested hearing as an alternative to pleading guilty. *People v Ealey*, 411 Mich 987 (1981), and *People v Adams*, 411 Mich 1070 (1981), citing Judge Bronson’s dissents in *People v Hooks*, 89 Mich App 124, 133–34 (1979), and *People v Darrell*, 72 Mich App 710, 714–16 (1976). Thus, the use of the terms “hearing” or “pending violation hearing” in a notice of violation or bench warrant does not alone sufficiently notify the probationer of the right to a contested hearing. There must be evidence in the record that the probationer was served with these documents or otherwise made aware of the right. *People v Stallworth*, 107 Mich App 754, 755 (1981).

The failure to explicitly tell an unrepresented probationer of his or her right to a contested hearing is error. *People v Radney*, 81 Mich App 301, 303 (1978), and *People v Brown*, 72 Mich App 7, 14 (1976). The Court of Appeals has held that use of the word “hearing” when asking whether the probationer wants appointed counsel is insufficient notice of the right to a contested hearing. *People v Moore*, 121 Mich App 452, 459 (1982).

## 7.12 Probationer's Right to Counsel at Probation Revocation Proceedings

Due process of law requires that the court advise an alleged probation violator of the right to be represented by an attorney, and of the right to appointment of counsel if the probationer is indigent and the violation proceedings include sentencing. *Mempa v Rhay*, 389 US 128, 136 (1967), and *People v Brown*, 17 Mich App 396, 397 (1969). MCR 6.445(B)(2)(b) states that the court must instruct defendant at arraignment that:

“[T]he probationer is entitled to a lawyer’s assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is unable to retain one.”

MCR 6.445(B)(3) adds that the court should appoint a lawyer for the defendant at the arraignment “if requested and appropriate.”\*

In addition to appointment of counsel for indigent probationers, the right to counsel involves allowing non-indigent probationers a reasonable opportunity to obtain counsel of their own choosing. The Court of Appeals has held that allowing a probationer one day to obtain counsel is not a “reasonable opportunity.” *People v Gulley*, 66 Mich App 112, 117 (1975).

## 7.13 Requirements for a Valid Waiver of Counsel

The requirements for a valid initial waiver of counsel at a criminal trial set forth in MCR 6.005(D) do not apply to probation revocation proceedings. *People v Belanger*, 227 Mich App 637, 646 (1998). “[D]ue process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his right to counsel and the appointment of counsel, if he is indigent, and determines if there is a knowing and intelligent waiver of that right.” *Id.* at 647.

“Factors to be considered when deciding whether defendant ha[s] made a knowing waiver of his right to counsel are defendant’s age, education, prior criminal experience, mental state, financial condition, and the various factors, pressures or inducements which led him to admit the allegations without the assistance of counsel.” *People v Kitley*, 59 Mich App 71, 73 (1975).

“A waiver of counsel and plea of guilty immediately following even a guarded intimation from a judge that the defendant may anticipate leniency [if he waives counsel] is suspect.” *People v Elbert*, 21 Mich App 677, 683 (1970).

\*See Section 7.36 for a discussion of limitations on the court’s authority to incarcerate a probationer who was not represented by counsel at the criminal trial for the offense that led to probation or an offense that is the basis for the revocation proceedings.

## 7.14 Advice of Right to Counsel Must Be Given Before Each Subsequent Proceeding

MCR 6.445(D) requires that “[e]ven though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E).”

MCR 6.005(E) provides that if the defendant waives his or her right to the assistance of a lawyer, the record of each subsequent proceeding need only show that the court advised the defendant of the continuing right to a lawyer’s assistance (at public expense if the defendant is indigent), and that the defendant waived that right. MCR 6.005(E)(1)–(3) state that before the court begins such proceedings:

“(1) the defendant must reaffirm that a lawyer’s assistance is not wanted; or

“(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

“(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.”

Effective January 1, 2006, MCR 6.005(E) also states:

“The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.”

The court must strictly comply with MCR 6.005(E). *People v McKinnie*, 197 Mich App 458, 460–61 (1992).

In *People v Graber*, 128 Mich App 185, 195 (1983), at arraignment, defendant was advised of his right to an attorney but expressly waived this right. Defendant pled guilty and was sentenced on that same day to prison. Defendant appealed and claimed error because he was not again informed of his right to counsel before being sentenced. The Court of Appeals found no error, stating that the sentencing phase of a single hearing was not “a subsequent proceeding” for purposes of the court rule.

## 7.15 Time Requirements and Release Pending a Contested Hearing

MCR 6.445(B)(4) and (5) require the court to determine if release of the probationer is appropriate and to set a hearing date. Those rules state:

“At the arraignment on the alleged probation violation, the court must

\* \* \*

“(4) determine what form of release, if any, is appropriate, and

“(5) subject to subrule (C), set a reasonably prompt hearing date or postpone the hearing.”

If a probationer is held in custody, MCR 6.445(C) requires a hearing on the violation to be held within 14 days of the arraignment or the probationer must be released. The court may also delay revocation proceedings to await the outcome of a criminal prosecution on which a probation violation may be based. *Id.*\*

MCR 6.106 governs pretrial release in criminal cases. See also MCL 771.4, which states in part:

“In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good.”

## 7.16 Time Requirements for Contested Hearings When Violation Is Based on a Criminal Offense

MCR 6.445(B)(5) states that, subject to MCR 6.445(C), the court at arraignment must set a reasonably prompt hearing date or postpone the hearing. MCR 6.445(C), in turn, states:

“(C) **Scheduling or Postponement of Hearing.** The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution.”

It is not necessary to delay a probation revocation hearing because criminal proceedings against the probationer are pending and involve the same conduct for which revocation is sought. *People v Nesbitt*, 86 Mich App 128, 136 (1978).<sup>\*</sup> However, if a probation revocation hearing is conducted prior to a criminal trial involving the same facts, the probationer’s testimony at the hearing and any evidence derived from it are inadmissible—except for purposes of impeachment or rebuttal—against the probationer at the

\*See Section 7.16, immediately below, for discussion of issues involved in the decision to delay probation revocation proceedings in these circumstances.

\*A probationer may also tender a *nolo contendere* plea. See Section 7.25, below.

subsequent criminal trial if a timely objection is made at that trial. *People v Rocha*, 86 Mich App 497, 512–13 (1978). The probationer must be advised before he takes the stand at the revocation hearing that his testimony and its fruits will not be admissible against him at the subsequent criminal trial. *Id.* at 513.

“Because the standard of proof [in a probation revocation hearing] is lower than the reasonable doubt standard employed in a criminal trial, probation may be revoked before the trial on the substantive offense, and a decision to revoke probation will be valid even if the defendant is ultimately acquitted of the substantive crime.” *People v Tebedo*, 107 Mich App 316, 321 (1981). If the underlying criminal offense is reversed on appeal, the probation violation must be set aside unless the probationer’s guilt of the offense was established by a preponderance of the evidence at the revocation hearing. *Id.* at 322.

Holding a probation revocation proceeding before criminal proceedings based on the same conduct does not render a guilty plea in those criminal proceedings involuntary. *People v Baines*, 83 Mich App 570, 573 (1978).

A probationer is not twice placed in jeopardy for the same criminal offense where the same criminal activity is the subject of both probation revocation and criminal proceedings. *People v Buelow*, 94 Mich App 46, 49 (1979). Because jeopardy does not attach at a probation revocation hearing, subsequent criminal proceedings do not violate double jeopardy prohibitions. *People v Johnson*, 191 Mich App 222, 226 (1991).

## 7.17 Time Requirements and Preliminary “Probable Cause” Hearings

In *Gagnon v Scarpelli*, 411 US 778, 781–82 (1973), the United States Supreme Court held that a probationer is entitled to both a preliminary “probable cause” hearing and a final revocation hearing. Michigan cases have, as a practical matter, eliminated the *Gagnon* requirement of two distinct hearings. The Court of Appeals has found Michigan’s procedure to be constitutionally equal or superior to the *Gagnon* procedure. It consists of a warrant procedure and the “strict due process requirements” of the revocation hearing. *People v Jackson*, 63 Mich App 241, 248 (1975).

In *People v Blakely*, 62 Mich App 250, 254 (1975), the Court of Appeals found that “where the actual revocation hearing is held sufficiently close in time and place to the arrest, due process would appear to be satisfied.” The Court held that a preliminary hearing is only required if there is an unusually substantial time lag between arrest and the determination of whether probation should be revoked. MCR 6.445(C) addresses this issue by requiring the probationer’s release if the revocation hearing is not held within 14 days of arraignment. In *Blakely*, *supra* at 256, the Court of Appeals stated that when the revocation hearing is delayed by a continuance, it is the “better practice” for the court to make an on-the-record determination of probable

cause at the revocation hearing. Compare, however, *People v Miller*, 77 Mich App 381, 385–86 (1977), where the Court found no violation of due process because the delay was caused by two continuances requested by the probationer, who was free on bond prior to the revocation hearing.

If the alleged probation violation is a new felony, the requirement of a separate “probable cause” hearing may be satisfied by the preliminary examination in the criminal case. The defendant-probationer must be given appropriate notice of the nature and effect of the dual purposes of the hearing, however. *People v Gladdis*, 77 Mich App 91, 94–95 (1977), and *Miller*, *supra* at 386.

A potentially troublesome issue regarding preliminary hearings can occur when the alleged probation violation is the commission of a criminal offense in a different county than the county where the defendant was placed on probation. When this occurs, the defendant is often incarcerated in that other county and a probation violation “hold” is placed on him or her. Under these circumstances, the probationer is not normally brought back to the county where he or she was placed on probation until after the criminal proceedings in the other county have concluded. Since the probationer does not receive a revocation hearing “close in time” to the arrest when this occurs, the question is whether due process requires that a preliminary hearing be held.

A preliminary hearing is not constitutionally required when the revocation charge does not deprive probationer of his or her liberty. *United States v Tucker*, 524 F2d 77, 78 (CA 5, 1975), cert den 424 US 966 (1976). Therefore, so long as probationer is being held in custody because of the pending criminal charge rather than because of the probation violation charge, it appears that a preliminary hearing is not required. See *People v Irving*, 116 Mich App 147, 151 (1982). However, if probationer is able to make bail on the pending criminal charge and is being held solely because of the probation violation charge, then due process would require either a preliminary hearing or a revocation hearing “close in time” to arrest.

## 7.18 Summary of Rules Governing Contested Hearings

Probation revocation proceedings consist of two distinct steps: 1) a factual determination that the violations charged in the notice have occurred, and 2) a discretionary determination that the proven charges warrant revoking probation. *People v Clements*, 72 Mich App 500, 503 (1976). The first step is discussed in Sections 7.18 to 7.28. The second step is discussed in Sections 7.29 to 7.37.

MCL 771.4 provides the general requirements for probation revocation hearings. That statute states, in part:

“Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of

pleadings applicable in criminal trials. . . . The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing."

The applicable court rule sets forth the required procedures for probation revocation hearings. MCR 6.445(E)(1)–(2) state:

"(1) *Conduct of the Hearing.* The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence.

"(2) *Judicial Findings.* At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403."

A probationer is not entitled to the full range of due process rights associated with a criminal trial. Due process requires only that probation revocation proceedings be conducted in a fundamentally fair manner. *Gagnon v Scarpelli*, 411 US 778, 781 (1973), and *People v Johnson*, 191 Mich App 222, 225–26 (1991).

A probationer is not entitled to a jury trial for a contested hearing. *People v Walker*, 17 Mich App 85, 86–87 (1969), and *People v Gladdis*, 77 Mich App 91, 96 (1977).

## 7.19 Judges Who May Preside Over Revocation Proceedings

MCL 771.4 states, in relevant part:

"If during the probation period *the sentencing court determines* that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, *the court may revoke probation.* All probation orders are revocable in any manner *the court that imposed probation* considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the

court determines that revocation is proper in the public interest.” [Emphasis added.]

One Court of Appeals panel has held that MCL 771.4 requires only that the court that ordered probation conduct revocation proceedings. *People v Collins*, 25 Mich App 609, 612 (1980). Other Court of Appeals panels have held that either the judge who imposed probation or his or her successor should preside over the probation violation proceeding. See *People v Clemons*, 116 Mich App 601, 603 (1981), *People v Biondo*, 76 Mich App 155, 160–61 (1977), and *People v Manser*, 172 Mich App 485, 487 (1988) (citing MCR 2.613(B), which governs corrections of error in judgments or orders by judges other than the judge who entered the judgment or order). Other decisions hold that, absent objection by the probationer before or at the revocation hearing, another judge of the sentencing court may conduct the revocation proceedings. *People v McIntosh*, 124 Mich App 705, 708–10 (1983), and *People v Williamson*, 413 Mich 895 (1982) (finding any error in having another judge conduct proceedings harmless, where the probationer pled guilty to an alleged violation).

In *People v McDonald*, 97 Mich 425, 431–32 (1981), vacated on other grounds 411 Mich 870 (1981), the Court of Appeals stated the rationale for requiring under normal circumstances the sentencing judge or his or her successor to conduct probation revocation proceedings:

“A trial judge who has placed a man on probation has shown confidence in the probationer’s ability to obey the law. He will receive periodic reports from the probation agent and may have a personal concern for the success of the probation. It is appropriate, if revocation must be considered, that the consideration be by the judge who is most acquainted with the matter.”

However, the rules stated above are inapplicable where the probationer files a motion for disqualification of the judge pursuant to MCR 2.003. *McDonald*, *supra* at 432.\*

Although *Gagnon v Scarpelli*, 411 US 778, 786 (1973) held that a probationer is entitled to a “neutral and detached hearing body” as a matter of due process, a judge is not precluded from conducting revocation proceedings merely because he or she placed the defendant on probation. *People v Nesbitt*, 86 Mich App 128, 139 (1978). “The ‘neutral and detached hearing body’ requirement is aimed at preventing revocation by one who was directly involved in bringing the charges against the defendant, such as a probation officer, or one who has personal knowledge of an event upon which the charge is based, such as a judge who orders revocation because of a failure to appear before him.” *Id.*

The prosecuting attorney is not required to be present at every probation violation hearing; however, “where probation proceedings are contested, it is

\*See Criminal Procedure Monograph 6: *Pretrial Motions—Third Edition* (MJJ, 2006), Section 6.22, for a discussion of motions to disqualify a judge.



preferable that the interrogation of the defendant be conducted by the prosecutor, so as to avoid the potential or the appearance of bias.” *People v Rocha (After Remand)*, 99 Mich App 654, 656 (1980).

## **7.20 Presentation of Evidence at Contested Hearings**

MCR 6.445(E)(1) contains the following rules governing the presentation of evidence at probation revocation hearings.

- 1) The evidence against the probationer must be disclosed to him or her.
- 2) The probationer has the right to be present at the hearing.
- 3) The probationer has the right to present evidence.
- 4) The probationer has the right to examine and cross-examine witnesses.
- 5) The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges.

A probationer has the right to insist that any witness who testifies against him or her take an oath or affirm to tell the truth. *People v Knox*, 115 Mich App 508, 514 (1982) (applying MCL 600.1432 and 600.1434 to probation revocation proceedings).

### **1. Probationer’s Right to Confront and Cross-Examine Witnesses**

As stated in MCR 6.445(E)(1), the probationer has the right to cross-examine witnesses. A probationer also has a due-process right to confront the witnesses against him or her unless the hearing officer finds good cause for not allowing confrontation. *Gagnon v Scarpelli*, 411 US 778, 786 (1973). Where the judge has no personal knowledge of the facts constituting the alleged violation but merely questions the probationer, the judge denies the probationer his or her rights to confront and cross-examine witnesses at a revocation hearing. *People v Smith*, 66 Mich App 639, 641 (1976).

If the only charge against the probationer is failure to report, the probation agent to whom the defendant was supposed to report must testify. *People v Taylor*, 104 Mich App 514, 517 (1981), and *People v Givens*, 82 Mich App 336, 340 (1978).

### **2. Evidence Must Be Relevant to a Charged Violation**

The court may consider only evidence that is relevant to a charged probation violation. MCR 6.445(E)(1) and *People v Graber*, 128 Mich App 185, 193–

94 (1983). The decision to revoke probation may not be based on conduct not prohibited by the conditions of probation and not charged in the notice of probation violation. *People v Givens*, 82 Mich App 336, 341 (1978), and *People v Elbert*, 21 Mich App 677, 681–82 (1970). Compare *People v Banks*, 116 Mich App 446, 451 (1982) (consideration of probationer’s explanation for possession and use of burglary tools went to defendant’s credibility rather than constituting an uncharged grounds for revocation), and *People v Longmier*, 114 Mich App 351, 354, 355 (1982) (judge’s explicit rejection of the probationer’s excuses for her failure to report indicated that the court “allowed uncharged conduct to taint its decision”).

The court may consider hearsay evidence at probation revocation proceedings. *People v Morgan*, 85 Mich App 353, 356 (1978).

“A defendant who, while on probation, is convicted of a crime in violation of his probation is not entitled to challenge, at his probation revocation hearing, the validity of the conviction which forms the basis for the charge of the probation violation.” *People v Irving*, 116 Mich App 147, 150 (1982).

### 3. Constitutional Limitations on Use of Evidence

The Michigan Court of Appeals has held that the privilege against self-incrimination contained in the federal and Michigan constitutions applies to probation revocation proceedings. Thus, a probationer cannot be compelled to testify against himself or herself at a probation revocation hearing. *People v Manser*, 172 Mich App 485, 488 (1988). Compare *Minnesota v Murphy*, 465 US 420, 435 n 7 (1984) (“Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer”).

“[E]vidence of a defendant’s failure to respond to an accusation of wrongdoing is inadmissible to prove guilt even if the defendant had, prior to his silence, waived his right to remain silent.” *People v Staley*, 127 Mich App 38, 41–42 (1983), relying on *People v Bobo*, 390 Mich 355 (1973). This rule applies to probation revocation hearings. *Staley, supra*.

Involuntary confessions are inadmissible in probation revocation hearings. *Id.* at 43–44. However, statements made to a probation officer during an interview are admissible in revocation or subsequent criminal proceedings even absent *Miranda* warnings. *People v Hardenbrook*, 68 Mich App 640, 644–46 (1976), and *Murphy, supra* 465 US at 429–31. See also *Fare v Michael C*, 442 US 707, 717 n 4, 725 (1979) (assuming without deciding that *Miranda* applies to cases involving juveniles, a juvenile’s request to speak with his probation officer did not constitute an invocation of the juvenile’s rights to counsel and to remain silent), and *People v Anderson*, 209 Mich App 527, 530–35 (1995) (juvenile corrections officer is not a law enforcement officer for *Miranda* purposes).

In *People v Perry*, 201 Mich App 347 (1993), lv den 445 Mich 926 (1994), the Court of Appeals addressed the applicability of the exclusionary rule to probation revocation proceedings, but no majority opinion resulted. Fitzgerald, J, would have held that the exclusionary rule applies in probation revocation proceedings. *Id.* at 359. Shepherd, J, would have held that the exclusionary rule applies when the police know or have reason to know that “they were targeting a probationer.” *Id.* at 351. Griffin, J, would have held that the exclusionary rule would apply to probation revocation where, examining the totality of the circumstances (1) the exclusion of the evidence would substantially further the deterrent purpose of the exclusionary rule, and (2) the need for deterrence would outweigh the harm to the probation system. *Id.* at 353. The United States Supreme Court has held that “the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees’ Fourth Amendment rights.” *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364 (1998).

## 7.21 Burden of Proof at Contested Hearings

The state has the burden of proving a violation by a preponderance of the evidence. MCR 6.445(E)(1).

The evidence is sufficient to sustain a finding if, viewed in the light most favorable to the prosecution, it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence. *People v Ison*, 132 Mich App 61, 66 (1984).

The “preponderance of the evidence” standard is to be applied whether the alleged violation is deemed a criminal offense or the failure to fulfill a condition of the probation order. *People v Williams*, 66 Mich App 67, 71 (1975). If the alleged violation is a criminal offense, there must be sufficient proof on each element of that offense. *People v Pippin*, 316 Mich 191, 193–94 (1946). Probation may be revoked even if the probationer was acquitted of the crime charged if the prosecution proves the probationer guilty of the conduct by a preponderance of the evidence. *People v Baines*, 83 Mich App 570, 572 (1978).

## 7.22 Required Findings of Fact and Conclusions of Law

MCR 6.445(E)(2) requires that at the conclusion of the contested hearing, the court must make findings in accordance with MCR 6.403.

MCR 6.403 states that “[t]he court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record.”

## 7.23 Nonexistent Condition as a Defense to an Alleged Probation Violation

Probation may not be revoked for the violation of conditions not contained in the probation order, even when those conditions were stated orally on the record at defendant's hearing. *People v Hill*, 69 Mich App 41, 44–45 (1976). In *Hill*, the court erroneously considered evidence of defendant's nonpayment of child support in revoking his probation, even though payment of support was not a condition of defendant's probation. See also *People v Pillar*, 233 Mich App 267 (1998) (sentencing court erred by considering alleged violations of a condition prohibiting unsupervised visitations with probationer's child, where the condition was not contained in the order).

## 7.24 Lack of Notice of Condition as a Defense to Revocation

A juvenile who is not advised of the ramifications of a subsequent conviction is not afforded due process and cannot thereafter have his or her probation revoked for failure to comply with the condition of probation requiring mandatory revocation and resentencing upon conviction of a felony or misdemeanor punishable by more than one year in prison. *People v Stanley*, 207 Mich App 300, 307 (1994), and *People v Valentin*, 220 Mich App 401, 405–06 (1996). See MCR 6.931(F)(2), which requires the court to provide this notice at the “juvenile sentencing hearing.” MCR 6.933(B)(1)(b) expressly prohibits a court from revoking a juvenile's probation unless the juvenile was given notice as required by MCR 6.931(F)(2). However, no such notice requirement applies in cases involving adults. See *People v McNeil*, 104 Mich App 24, 26–27 (1981).

Pursuant to MCL 771.2(2), the court may amend a probation order at any time. *People v Graber*, 128 Mich App 185, 191 (1983), and *People v Lemon*, 80 Mich App 737, 741–42 (1978). However, “an ex parte order amending probation which orders a conditionally free defendant to be confined is in violation of the due process clause of the Michigan Constitution.” *People v Jackson*, 168 Mich App 280, 284 (1988). Before making such an amendment, the court must give the probationer notice of the reason for the proposed amendment and conduct an impartial hearing. *Id.* See also *People v Britt*, 202 Mich App 714, 717 (1993) (because placement of the probationer in an electronic tethering program did not constitute confinement, the court properly amended the probation order to require the probationer to comply with the tethering program without conducting a hearing).

## 7.25 Summary of Procedures for Accepting Guilty and *Nolo Contendere* Pleas

MCR 6.445(F) states:

\*See Sections 7.12–7.14, above.

**“(F) Pleas of Guilty.** The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer’s response, must

(1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer’s assistance as set forth in subrule (B)(2)(b),\*

(2) advise the probationer of the maximum possible jail or prison sentence for the offense,

(3) ascertain that the plea is understandingly, voluntarily, and knowingly made, and

(4) establish factual support for a finding that the probationer is guilty of the alleged violation.”

MCR 6.445(F) states that the probationer may plead guilty to an alleged violation. A probationer may also enter, and the court may accept, a plea of *nolo contendere* to a probation violation charge. *People v Kreigh*, 165 Mich App 697, 699 (1988).

## 7.26 Advice of Rights and Understanding, Voluntary, and Knowing Waiver of Rights

The rules governing the taking of guilty pleas in criminal proceedings do not apply to probation revocation proceedings. *People v Rial*, 399 Mich 431, 435–36 (1976). Michigan appellate courts have avoided requiring the use of a “checklist” format similar to that used when accepting guilty pleas in criminal cases. *People v Brooks*, 91 Mich App 624, 628 (1979), and cases cited therein. “Prosecutors, probation officers, and courts would be well-advised, however, to insure that the record in some manner adequately reflects that the defendant knew of his or her due process rights, and made a knowing and voluntary waiver before pleading guilty.” *Id.*

### 1. Required Advice of Rights to a Contested Revocation Hearing

Before accepting a guilty plea, the court must advise the probationer that by pleading guilty he or she gives up the right to a contested revocation hearing and, if the probationer is unrepresented, the right to be represented by an attorney. MCR 6.445(F)(1). The court must specifically inform the probationer that, as an alternative to pleading guilty, he or she has the right to a hearing at which he or she will have the opportunity to contest the charges. Failure to so inform the probationer requires reversal absent “direct and

affirmative proof” that the probationer was aware of this right and that it would be waived by pleading guilty. *People v Edwards*, 125 Mich App 831, 833 (1983), and *People v Moore*, 121 Mich App 452, 457 (1983). Absent “direct and affirmative proof” that the probationer read a notice of violation containing notice of the right to a contested hearing, the probationer’s receipt of such a notice does not constitute adequate advice of the right. *Edwards, supra* at 835. Notice of the right to a contested hearing as an alternative to pleading guilty is especially important when the probationer has waived the right to counsel. *People v Alame*, 129 Mich App 686, 690 (1983).

Advice of the right to a contested hearing is not required where the plea proceeding immediately follows an arraignment at which the probationer was fully advised of his right to a contested probation revocation hearing and the rights incident thereto. *People v Terrell*, 134 Mich App 19, 23 (1984).

The court must also advise the probationer of the maximum possible jail or prison sentence for the offense for which the probationer was placed on probation. MCR 6.445(F)(2). The failure to so advise the probationer has resulted in reversal. *People v Gorzen*, 126 Mich App 464, 467 (1983), and *Alame, supra* at 689–90.

## 2. A Plea Must Be Understanding, Voluntary, and Knowing

Before accepting the plea, the court must ascertain that the plea is understandingly, voluntarily, and knowingly made. MCR 6.445(F)(3). “[I]n order to insure that a defendant’s admission of probation violation is ‘knowing and voluntary’ prior to the court’s acceptance of the plea, it is necessary that the defendant be at least advised of his due process right to a hearing.” *People v Hardin*, 70 Mich App 204, 206 (1976).

When there is a *bona fide* doubt that a defendant may not be competent to enter a guilty plea to a probation violation, the court should not accept the plea. Standard competency procedures should be followed. *People v Martin*, 61 Mich App 102, 108 (1975).\*

\*See Criminal Procedure Monograph 6: Pretrial Motions—Third Edition (MJJ, 2006), Section 6.14, for a discussion of these procedures.

## 7.27 Establishing Factual Support for the Plea

Before accepting the plea, the court must establish support for a finding that probationer is guilty of the violation charged. MCR 6.445(F)(4).

In *People v Alame*, 129 Mich App 686 (1983), the probationer was charged with three different violations. The probation officer testified that the probationer had been apprised of the allegations against him, then read one of the allegations into the record. The Court of Appeals reversed for failure to establish support for a finding that the probationer was guilty of the violation charged. The Court noted that the sentencing court “did not make any finding at all but simply accepted defendant’s plea without even stating the charges on the record.” *Id.* at 690.

In *People v Ison*, 132 Mich App 61 (1984), the probationer was charged with three counts of violating probation. At the beginning of the probation violation hearing, defense counsel indicated that the defendant would contest two of the charges but would not contest the third charge. The defendant himself never offered a plea, and no evidence was taken on the third charge. The Court of Appeals reversed, holding that the proceedings did not constitute a guilty plea because the defendant never admitted guilt. The statement by counsel was not evidence and there was no other evidence sufficient to support conviction. *Id.* at 68. The Court emphasized that the court rule requirements must be met even if the defendant seeks to plead guilty to less than all of the charges. *Id.* See also *People v Allen*, 71 Mich App 465, 466 (1976), where the Court reversed because the record did not show that the probationer was aware of his right to a contested hearing, and counsel, not the probationer, stated that the probationer desired to plead guilty.

In *People v Hall*, 138 Mich App 86, 89–92 (1984), the probationer was charged with failing to report to his probation officer. At the revocation proceeding, the sentencing court established that the probationer had notice of the charge prior to the hearing, read the charge to the probationer, and established that the probationer understood the charge. The probationer then pled guilty to the charged violation. The Court of Appeals held that the sentencing court established a sufficient factual basis for finding the probationer guilty of the charged violation. The Court stated as follows:

“In this case, the lower court did not explicitly make a ‘finding’ that defendant was guilty of the charged offense. In this sense, the court did not comply with the court rule. However, as noted in both *Alame* and *Ison*, not every deviation from the rule requires reversal, provided that a record sufficient to show that the plea was understanding, voluntary, and knowing has been made. We find that such a record was made here. The court stated the charge against defendant on the record and twice ascertained that defendant understood the charge. The charge itself was clear-cut and precise—failure to report to defendant’s probation officer . . . . Defendant’s admission of guilt to the stated charge was sufficient to establish a basis for finding that defendant was guilty.” *Id.* at 92.

## 7.28 Withdrawal of Guilty Plea

A probationer may move to withdraw a guilty plea to a probation violation, and failure to do so may result in waiver of issues regarding the court’s compliance with MCR 6.445(F). *People v Baugh*, 127 Mich App 245, 246–47 (1983).

## 7.29 Alternatives Following a Finding of Probation Violation

MCR 6.445(G) states in part that if the court finds that the probationer has violated a condition of probation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. If the court finds that the probationer has violated a condition of probation, the court has discretion to continue or revoke probation. *People v Laurent*, 171 Mich App 503, 505 (1988). The court may only consider conduct charged in the petition when deciding whether to revoke or continue probation. *Id.* at 506.

Prior to imposition of sentence, a probationer has a due-process right to present circumstances in mitigation suggesting that the violation does not warrant revocation of probation and imposition of a sentence of imprisonment. *People v Clements*, 72 Mich App 500, 504–06 (1976), citing *Gagnon v Scarpelli*, 411 US 778, 782 (1973). However, a court is not required to state explicitly why it has rejected alternatives to incarceration. *Black v Romano*, 471 US 606, 611 (1985).

A violation of a condition of probation is not a crime itself. *People v Johnson*, 191 Mich App 222, 226–27 (1991), and *People v Burks*, 220 Mich App 253, 256 (1996). If the court decides to revoke probation, it must resentence the probationer for the original offense that led to his or her placement on probation. *Johnson v United States*, 529 US 694, 700–01 (2000), and *People v Kaczmarek*, 464 Mich 478, 483 (2001). MCL 771.4 provides that “if a probation order is revoked the court may proceed to sentence such probationer in the same manner and to the same penalty as it might have done if the probation order had never been made.”

The maximum sentence for a probation violation must be the same as the maximum sentence for the underlying offense. *People v Maxson*, 163 Mich App 467, 470–71 (1987). Fines, fees, and costs may only be imposed if provided for in the penal statute under which the probationer was originally convicted. *People v Krieger*, 202 Mich App 245, 247–48 (1993).

The legislative sentencing guidelines apply to a defendant’s sentence of imprisonment following probation revocation when the offense for which the defendant was sentenced to probation was committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 559 (2005); MCL 769.34(2).

When a sentence is imposed following the imposition and revocation of probation for a conviction subject to the guidelines, MCL 771.4 authorizes the sentencing court to sentence the defendant to the same penalty that could have been imposed if probation had not been granted; that is, MCL 771.4 permits the court to sentence a defendant according to the guidelines recommendation as calculated for the defendant’s sentencing offense at the time of the defendant’s initial sentencing. *Hendrick*, *supra* at 562. The Michigan Supreme Court emphasized that MCL 771.4 does not require that a sentencing



court be limited to imposing only a sentence that could have been imposed immediately after the defendant's conviction. A sentence imposed pursuant to MCL 771.4

"is clearly permissive, not mandatory. It states that 'if probation is revoked, the court 'may' sentence the defendant as if probation had never been granted. While the sentencing court *may* sentence the probationer in the same manner and to the same penalty, nothing in the statute requires it to do so." *Hendrick, supra* at 561-62.

\*The Court of Appeals wrongly indicated that the conduct considered by the trial court was included in scoring the defendant's OVs and PRVs.

The *Hendrick* Court affirmed in part\* the Court of Appeals decision in *People v Hendrick*, 261 Mich App 673 (2004). Said the Court:

"The Court of Appeals correctly held that the sentencing guidelines apply to sentences imposed after a probation violation and that acts giving rise to the probation violation may constitute substantial and compelling reasons to depart from the guidelines.

\* \* \*

"Without a mandate to impose a sentence on the probationer in the same manner and to the same penalty that could have been imposed if the probation order had never been made, it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative sentencing guidelines." *Hendrick, supra* at 557 and 563. (Footnotes omitted.)

Because the rule in *People v Hendrick*, 472 Mich 555 (2005), was clearly foreshadowed by the unambiguous language in MCL 771.4 and MCL 769.34(2), it applies retroactively. *People v Parker*, 267 Mich App 319, 328 (2005).

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, 267 Mich App 184, 185–86 (2005). According to the *Schaafsma* Court:

"[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding.

We conclude that the offender’s probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines.”  
*Schaafsma, supra.*

Consecutive sentences may be imposed where a person commits a felony while another felony charge is pending. MCL 768.7b(2)(a). It is unclear whether a charge is pending where the probationer is still on probation when he or she commits the subsequent felony. Compare *People v Leal*, 71 Mich App 319, 321 (1976), and *People v Malone*, 177 Mich App 393, 401–02 (1989) (statute does not apply to an offense committed while the defendant is on probation, as the prior offense is no longer pending), and *People v Dukes*, 189 Mich App 262, 266–67 (1991) (case is pending until a defendant is sentenced).

## 7.30 Revocation of “Juvenile Probation”

A court may not revoke a juvenile’s probation unless the juvenile was informed at the original sentencing that conviction of a felony or misdemeanor punishable by more than one year’s imprisonment would result in mandatory probation revocation. MCR 6.933(B)(1)(b). If the court finds that a juvenile has violated “juvenile probation” by conviction of a felony or a misdemeanor punishable by more than one year’s imprisonment, *and* the juvenile was properly noticed at the original sentencing, the court *must* revoke the juvenile’s probation and order the juvenile committed to the Department of Corrections for a term of years not to exceed the penalty that could have been imposed for the offense that led to the probation. MCR 6.933(B)(1)(a). In imposing sentence, the court shall grant credit against the sentence as required by law. MCL 771.7(1) and MCR 6.933(B)(1)(a).

MCR 6.933(C) addresses a court’s sentencing options after mandatory probation revocation with regard to two specific offenses: manufacture, delivery, or possession with intent to deliver 650 grams (1000 grams beginning March 1, 2003) or more of a controlled substance and first-degree murder. MCR 6.933(C)(1)–(2). Consonant with the Supreme Court’s interpretation of MCL 771.7(1) in *People v Valentin*, 457 Mich 1, 13–14 (1998), subrule (C)(1) provides that a juvenile who is placed on probation and committed to state wardship for manufacture, delivery, or possession with intent to deliver 650 grams (1000 grams beginning March 1, 2003) or more of a controlled substance may be resentenced only to a term of years, not to a parolable or nonparolable life sentence, following mandatory probation revocation for committing a subsequent felony.

\*It should also be noted that effective January 1, 1997, juveniles convicted of first-degree murder in “automatic waiver” proceedings must be committed to the Department of Corrections. See MCL 769.1(g). Thus, application of new MCR 6.933(C)(2) will be limited to juveniles whose offenses occurred prior to January 1, 1997.

Similarly, MCR 6.933(C)(2) addresses probation revocation and resentencing of a juvenile who was convicted of first-degree murder. If a juvenile convicted of first-degree murder violates probation by being convicted of a felony or misdemeanor punishable by more than one year’s imprisonment, subrule (C)(2) permits the court to resentence the juvenile only to a term of years and not to nonparolable life. The subrule expressly prohibits the court from imposing a nonparolable life sentence on the juvenile, but the rule is silent with regard to parolable life sentences. Any uncertainty suggested by (C)(2)’s express mention of nonparolable life and its silence regarding parolable life appears to be settled by the *Valentin* Court’s analysis of MCL 771.7(1). Because *Valentin* interpreted the language used in MCL 771.7(1) to prohibit parolable life sentences, and because MCL 771.7(1) is also applicable to probation revocation and resentencing of a juvenile convicted of first-degree murder, MCR 6.933(C)(2) must also prohibit the imposition of parolable life sentences.\*

If the court finds that the juvenile has violated “juvenile probation” by means other than being convicted of a felony or misdemeanor punishable by more than one year’s imprisonment, MCR 6.933(B)(2) permits the court to choose whether to continue the juvenile’s probation and state wardship or to order the juvenile committed to the Department of Corrections. See also MCL 771.7(2). In addition to the juvenile’s continued probation or commitment to the Department of Corrections, the court may order any of the following:

- “(a) a change of placement,
- “(b) restitution,
- “(c) community service,
- “(d) substance abuse counselling,
- “(e) mental health counselling,
- “(f) participation in a vocational-technical education program,
- “(g) incarceration in a county jail for not more than 30 days, and
- “(h) any other participation or performance as the court considers necessary.” MCR 6.933(B)(2)(a)–(h).

If the court orders incarceration in county jail, and if the juvenile is under 17 years of age, the juvenile must be placed separately from adult prisoners as required by law. MCR 6.933(B)(2).

## 7.31 Summary of Required Procedures for Imposing Sentence Following Revocation of Probation

MCR 6.445(G) states:

**“(G) Sentencing.** If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B) and (E).”

If the court revokes “juvenile probation” pursuant to MCR 6.933(B)(1), the court must receive an updated presentence report and comply with MCR 6.445(G) before it imposes a prison sentence on the juvenile. MCR 6.933(B)(3).

## 7.32 Receiving an Updated Presentence Report

MCR 6.425(B)\* states:

**“(B) Presentence Report; Disclosure Before Sentencing.** The court must provide copies of the presentence report to the prosecutor and the defendant’s lawyer, or the defendant if not represented by a lawyer, at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court’s decision to exempt part of the report from disclosure is subject to appellate review.”

Proposed scoring of the sentencing guidelines must accompany the presentence report. MCR 6.425(D).\*

\*Effective July 13, 2005.

\*Effective July 13, 2005.

A reasonably updated presentence information report (“PSIR”) must be considered by the court when sentencing a probationer to prison. *People v Crook*, 123 Mich App 500, 503 (1983) (five-month-old PSIR was not reasonably updated where several changed circumstances were alleged).

If the probationer was originally charged with or convicted of a felony, the sheriff or Department of Corrections must mail the victim of the probationer’s original offense notice if the probationer is convicted of a new crime. MCL 780.769(1)(k). In all cases, the victim of the probationer’s original offense may request that his or her written impact statement be included in the PSIR. MCL 771.14(2)(b). “The victim has the right to submit or make a written or oral impact statement to the probation officer for use by the officer in preparing a presentence investigation report . . . .” MCL 780.764. See also MCL 780.824 (the victim has the same right in a misdemeanor case if a PSIR is prepared).

### 7.33 Required Procedures at the Sentencing Hearing

\*Effective July 13, 2005.

MCR 6.425(E)(1)\* states:

“The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

“(a) determine that the defendant, the defendant’s lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

\*See Section 7.34, below.

“(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (E)(2),\*

“(c) give the defendant, the defendant’s lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

\*See Section 7.35, below, for discussion of credit for time served.

“(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,\*,

“(e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure, and

“(f) order that the defendant make full restitution as required by law to any victim of the defendant’s course of conduct that gives rise to the conviction, or to that victim’s estate.”

In addition to providing impact information for inclusion in the PSIR,\* the victim or a person designated by the victim may deliver an oral impact statement to the court at the sentencing hearing. MCL 780.765 and MCL 780.825. The court must give the victim “an opportunity to advise the court of any circumstances [he or she] believe[s] the court should consider in imposing sentence.” MCR 6.425(E)(1)(c). See also *People v Steele*, 173 Mich App 502, 504–05 (1988) (although the victim’s impact statements were emotional, they were within her statutory rights, and the defendant did not object to the statements).

MCR 6.425(E)(1)(f) requires the court to “order that the defendant make full restitution as required by law . . . .” Restitution will have been ordered when the probation order was entered. See MCL 771.3(1)(e). MCL 780.766(19) states that if “a defendant who is ordered to pay restitution under this section is remanded to the jurisdiction of the department of corrections, the court shall provide a copy of the order of restitution to the department of corrections when the defendant is remanded to the department’s jurisdiction.” MCL 780.826(16) contains a substantially similar provision that requires the court to transmit the order of restitution when the court determines that the individual subject to the order has been remanded to the Department of Corrections.\*

\*See Section 7.32, immediately above.

\*See Section 7.37, below, for discussion of when a court may revoke probation based on the probationer’s failure to comply with a restitution order.

## 7.34 Responding to Challenges to the Presentence Report

MCR 6.425(E)(2)\* states:

**“(2) Resolution of Challenges.** If any information in the presentence report is challenged, the court must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

“(a) correct or delete the challenged information in the report, whichever is appropriate, and

“(b) provide defendant’s lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.”

\*Effective July 13, 2005.

A defendant is entitled to be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736, 740–41 (1948), and *People v Malkowski*, 385 Mich 244, 249 (1971). The sentencing judge must respond to claims of inaccuracy, and failure to do so requires resentencing. *People v Harrison*, 119 Mich App 491, 494–99 (1982). Defendant is entitled to have information stricken from the presentence report where the sentencing court stated it would disregard the information challenged as inaccurate. *People v Britt*, 202 Mich App 714, 718 (1993), *People v Harris*, 190 Mich App 652, 662 (1991), and *People v Martinez (After Remand)*, 210 Mich App 199, 202–03 (1995).

When issues of fact are controverted, the sentencing court must apply a “preponderance of the evidence” standard in resolving the controversy. The defendant bears the burden of going forward with “an effective challenge.” If the record contains evidence supporting or disproving a factual assertion in the presentence report, the court may, in its discretion, take further proofs. *People v Walker*, 428 Mich 261, 267–68 (1987).

## 7.35 Granting Credit for Time Served

MCR 6.425(E)(1)(d) requires the court to give a defendant credit for time served in “jail” when imposing a sentence. There are several statutory provisions that mandate credit for time served for all criminal defendants, including the following:

- 1) time spent in jail prior to sentencing because of being denied or unable to post bond, MCL 769.11b;
- 2) time spent in a juvenile facility prior to sentencing because of being denied or unable to furnish bond, MCL 764.27a(5); see also *People v Thomas*, 58 Mich App 9, 10–11 (1975); and
- 3) time spent in custody at a “mental hospital” during competency evaluations and treatment, MCL 330.2042; see also *People v Gravlin*, 52 Mich App 467, 469 (1974).

Sentence credit under MCL 769.11b is limited to jail time served for the offense of which the defendant is convicted. A defendant is not entitled to credit for time served on unrelated charges committed while out on bond. *People v Prieskorn*, 424 Mich 327, 340 (1985). Nor does the statute entitle a defendant to credit for time served on unrelated offenses in other jurisdictions between conviction and sentencing on a Michigan offense, whether or not Michigan authorities have placed, or could have placed, a detainer or “hold” on the jailed defendant. *People v Adkins*, 433 Mich 732, 734 (1989). See, however, *Id.* at 751 n 10 (opinion “must not be seen as in any way *prohibiting* a sentencing judge from granting sentence credit for time served for an unrelated offense should it be decided such credit is warranted. The trial court’s sentencing discretion under our indeterminate sentencing law, MCL 769.1; MSA 28.1072, clearly would permit reducing a defendant’s minimum sentence should the court think such action appropriate”).

Under MCL 769.11b, a defendant is not entitled to credit for time served as a parole detainee on a sentence he received in a foreign jurisdiction. *People v Seiders*, 262 Mich App 702, 707-708 (2003).

“The Double Jeopardy Clauses of the United States and Michigan Constitutions require that a probationer be given credit for time served while *incarcerated* as a condition of probation.” *People v Hite (After Remand)*, 200 Mich App 1, 4 (1993) (emphasis in original, footnote omitted), citing *People v Sturdivant*, 412 Mich 92, 96 (1981). Sentence credit under the double jeopardy clauses is required only for time spent in “jail” as that term is commonly used and understood, and the purpose of confinement must be incarceration rather than rehabilitation. *People v Whiteside*, 437 Mich 188, 202 (1991).

To avoid violating the double jeopardy prohibitions of the state and federal constitutions, Michigan appellate courts have held that a probationer is entitled to sentence credit for time spent in the following facilities:

- 1) in jail for an initial period of incarceration as a condition of probation, *Sturdivant, supra*; and
- 2) in a “Special Alternative Incarceration Unit” or “boot camp,” *Hite, supra* at 2.

Neither MCL 769.11b nor the constitutional prohibitions against double jeopardy prevent a probationer from being denied credit for time spent in a “tether” program. *People v Reynolds*, 195 Mich App 182, 183–84 (1992), and *People v Smith*, 195 Mich App 147, 151–52 (1992). In *Whiteside, supra*, the Court held that neither MCL 769.11b nor the double jeopardy clauses of the state and federal constitutions require that a defendant be given credit for time served in a drug rehabilitation program.

A juvenile is entitled to receive credit for the entire time served on “juvenile probation,” not just the time during which the juvenile was in custody. In *People v Cokley*, unpublished opinion per curiam of the Court of Appeals, decided January 9, 1995 (Docket No. 156947) (Marilyn Kelly, PJ, and Shepherd, and Borrello, JJ), the Court interpreted MCL 771.7, which governs sentencing of automatically waived juveniles following probation revocation. The statute in *Cokely* required the sentencing judge to give credit against the sentence “for the period of time that the juvenile served on probation.” The Court of Appeals held that the language required credit for the entire period that the juvenile was on probation, including the time he was living at home with his grandparents.



## 7.36 Sentencing the Probationer When Uncounseled Misdemeanor Convictions Are Involved

\*As amended, effective January 1, 2006.

A criminal defendant's right to the assistance of counsel is recognized in the federal and state constitutions and in a Michigan statute. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. However, there is no federal or state constitutional right to appointed counsel when a defendant is charged with a misdemeanor and no sentence of imprisonment is imposed. *People v Richert (After Remand)*, 216 Mich App 186, 192–194 (1996). An indigent defendant has the right to an appointed attorney whenever he or she is charged with an offense for which a minimum jail sentence is required on conviction, or whenever the court decides it might impose a jail sentence on the defendant, even if the sentence is suspended. MCR 6.610(D)(2).\*

\*Effective January 1, 2006.

MCR 6.610(F)(2) addresses enhancement of a subsequent charge as it relates to a defendant's right to counsel for a previous conviction. MCR 6.610(F)(2)\* states:

“Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction.”

\*Effective January 1, 2006, the enhancement provision found in MCR 6.610 (E) is located in MCR 6.610(F).

MCR 6.610(E)\* was amended after the Michigan Supreme Court's decision in *People v Reichenbach*, 459 Mich 109 (1998). In *Reichenbach*, the defendant asserted that his 1989 plea-based and counseless misdemeanor conviction could not be used to enhance a later conviction because he had neither been informed in 1989 of his right to *appointed* counsel nor had he waived his right to counsel before pleading guilty. *Id.* at 115. In deciding that the defendant's 1989 conviction was properly used to enhance a later charge despite the absence of counsel, the Michigan Supreme Court adopted the United States Supreme Court's decisions in *Argersinger v Hamlin*, 407 US 25 (1972), and *Scott v Illinois*, 440 US 367 (1979).

*Argersinger* decided the fundamental principle that regardless of the severity of the offense charged, an individual could not be deprived of his or her liberty without having had the assistance of counsel. *Argersinger*, *supra* at 40. The *Argersinger* Court concluded that wherever “actual imprisonment” was the result, the defendant must receive the benefit of counsel. *Id.* The *Scott* Court affirmed *Argersinger*'s “actual imprisonment” distinction and emphasized the difference between “actual imprisonment” and the “mere threat of imprisonment.” *Scott*, *supra* at 373–374. The *Reichenbach* Court concluded:

“The Michigan Constitution does not afford indigent misdemeanor defendants the right to appointed counsel

absent ‘actual imprisonment’ under *Argersinger* and *Scott*.” *Reichenbach, supra* at 118.

For purposes of the actual sentence imposed after an indigent defendant’s conviction, the United States Supreme Court eliminated the significance of “actual imprisonment” versus “threatened” imprisonment. Following the Court’s decision in *Alabama v Shelton*, 535 US 654 (2002), not only is an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel exempt from receiving a sentence of “actual imprisonment,” a *probated* or *suspended* sentence of imprisonment is similarly invalid under the same circumstances.\*

In *Shelton*, the United States Supreme Court implicitly disagreed with the Michigan Supreme Court’s reasoning in *Reichenbach*. The Court affirmed the Alabama Supreme Court’s conclusion (and the Alabama Court’s explicit disagreement with *Reichenbach*) that no real distinction could exist between “actual imprisonment” and probated or “threatened” imprisonment for purposes of an indigent defendant’s right to counsel. *Shelton, supra* at 659. Because an unrepresented indigent defendant who had not waived his or her right to counsel could not be made to serve any part of a “probated” or “suspended” sentence for the same reason that no term of “actual” imprisonment could be imposed, any distinction was illusory. *Id.* The United States Supreme Court held that a defendant has a constitutional right to counsel when he or she receives a probated or suspended sentence of imprisonment. *Id.* at 674.\* In other words, an indigent defendant who is not represented by counsel and who has not waived the right to appointed counsel may not be given a probated or suspended sentence of imprisonment.

On the other hand, it appears that the court may revoke probation and incarcerate a probationer on the basis of new uncounseled misdemeanor convictions that do not result in actual or threatened imprisonment. In *People v Olah*, 409 Mich 948, 948–49 (1980), the Michigan Supreme Court, relying on *Baldasar v Illinois*, 446 US 222 (1980), held that a sentencing court could not revoke probation on the basis of new uncounseled misdemeanor convictions. See also *People v Courtney*, 104 Mich App 454, 456–57 (1981). However, *Baldasar* was overruled by *Nichols v United States*, 511 US 738, 747–48 (1994), which held that uncounseled misdemeanors resulting only in a fine may be used to enhance a defendant’s sentence for a subsequent offense. See *Reichenbach, supra* at 122–24 (1998).

Moreover, a defendant may not collaterally attack the validity of such misdemeanor convictions during the probation revocation proceeding. *People v Thornton*, 126 Mich App 449, 450 (1983).

\*Provisions addressing suspended sentences were added to MCR 6.610(D)(2) and (E)(2), effective January 1, 2006.

\*Amendments to MCR 6.610(D)(2), effective January 1, 2006, incorporate the United States Supreme Court’s holding in *Shelton, supra*.

## 7.37 Indigent Probationers May Not Be Incarcerated for Failure to Pay Fines, Costs, or Restitution

Probation may not be revoked for failure to pay fines, costs, or restitution if the reason for non-payment was the defendant's indigence. *Bearden v Georgia*, 461 US 660, 664 (1983), *People v Terminelli*, 68 Mich App 635, 637–38 (1976), and *People v Lemon*, 80 Mich App 737, 745 (1978). In criminal cases, the court has authority to alter and amend conditions of probation. MCL 771.2(2). Upon petition by the probationer, the court should conduct a hearing to determine whether the probation order should be modified. *People v Ford*, 410 Mich 902 (1981), and *Lemon, supra* at 743 (sentencing court abused its discretion by refusing to modify the restitution condition of the probation order where the defendant petitioned for modification of the order).

If the court determines that restitution is not being paid or has not been paid as ordered, the court may revoke probation or, after considering the hardship to both the probationer and victim, modify the method of payment. In addition, the prosecuting attorney or a person named in the restitution order may begin proceedings to enforce the restitution order. MCL 780.766(18) and MCL 780.826(15). If the court determines that costs are not being paid as ordered, the court may remit all or a part of the amount due or modify the method of payment. MCL 771.3(6)(b).

In criminal cases, the court may revoke probation if the defendant fails to comply with a restitution order or order to pay costs and has not made a good-faith effort to comply with the orders. MCL 780.766(11), MCL 780.826(11), and MCL 771.3(8). The court must consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. *Id.*

MCL 780.766(14) states that "a [felony] defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole or otherwise for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good-faith effort to do so." MCL 780.766(11) and MCL 780.826(14) contain substantially similar requirements for cases involving juveniles and misdemeanants. But see MCR 6.931(F)(10), which prohibits a court from committing a juvenile to the Department of Corrections for failure to comply with a restitution order.

The required findings in the foregoing statutes are necessary to avoid an equal protection violation when a defendant or juvenile is incarcerated for failing to pay fines, costs, or restitution. A sentence that exposes an indigent offender to incarceration unless he or she pays fines, costs, or restitution violates the Equal Protection Clauses of the state and federal constitutions because it results in unequal punishments based on ability to pay the fines, costs, or restitution. *Tate v Short*, 401 US 395, 397–400 (1971), and *People v Baker*,

120 Mich App 89, 99 (1982). In *People v Collins*, 239 Mich App 125 (1999), the trial court sentenced defendant to 48 months of probation, including a year in jail. The sentence provided that 270 days of the jail time would be suspended if defendant paid \$31,505.50 in restitution. Defendant sought a hearing on his ability to pay the restitution, but the trial court denied defendant's request. The trial court reasoned that defendant was not being jailed for failing to pay restitution; instead, he was being denied a suspension of the sentence for failing to meet a condition of the suspension. The Court of Appeals rejected the trial court's distinction. *Id.* at 133. Defendant could not be required to serve the suspended portion of the sentence without findings by the trial court that defendant had the ability to pay the restitution and had wilfully defaulted. *Id.* at 136. The Court of Appeals remanded the case to the trial court for findings on these issues.

### 7.38 Advice of Right to Appeal or File Application for Leave to Appeal

Effective May 1, 2005, MCR 6.445(H)(1) was amended to clarify a probationer's appellate rights when the sentence imposed involves incarceration. MCR 6.445(H) does not apply to criminal cases cognizable in district courts. MCR 6.001(B). "An appeal from a misdemeanor case is governed by subchapter 7.100." MCR 6.625.

MCR 6.445(H) states:

"(1) In a case involving a sentence of incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that

"(a) the probationer has a right to appeal, if the underlying conviction occurred as a result of a trial, or

"(b) the probationer is entitled to file an application for leave to appeal, if the underlying conviction was the result of a plea of guilty or nolo contendere."

"(2) In a case that involves a sentence other than incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that the probationer is entitled to file an application for leave to appeal."

A criminal defendant may appeal or file an application for leave to appeal following conviction and imposition of probation *and* following revocation of probation. However, an appeal following revocation of probation is limited to alleged errors in the probation revocation proceeding. *People v Pickett*, 391

Mich 305, 316 (1974). But see *People v McNeil*, 104 Mich App 24, 26 (1981), and *People v Ford*, 95 Mich App 608, 610 (1980), rev'd on other grounds 410 Mich 902 (1981) (Court of Appeals may address an issue arising from the original plea and sentence if it “relates to whether defendant’s probation was lawfully terminated”). Challenges to information in the presentence report regarding the original offense must be raised at sentencing on the original offense, not in a motion for resentencing following revocation of probation. *People v Maxson*, 163 Mich App 467, 472 n 1 (1987).

After pleading guilty to a probation violation, the probationer may only appeal jurisdictional issues. *People v Bell*, 67 Mich App 351, 354 (1976). A guilty plea to an alleged probation violation waives the probationer’s right to challenge the factual findings of the court revoking probation. *People v New*, 427 Mich 482, 488–91 (1986).

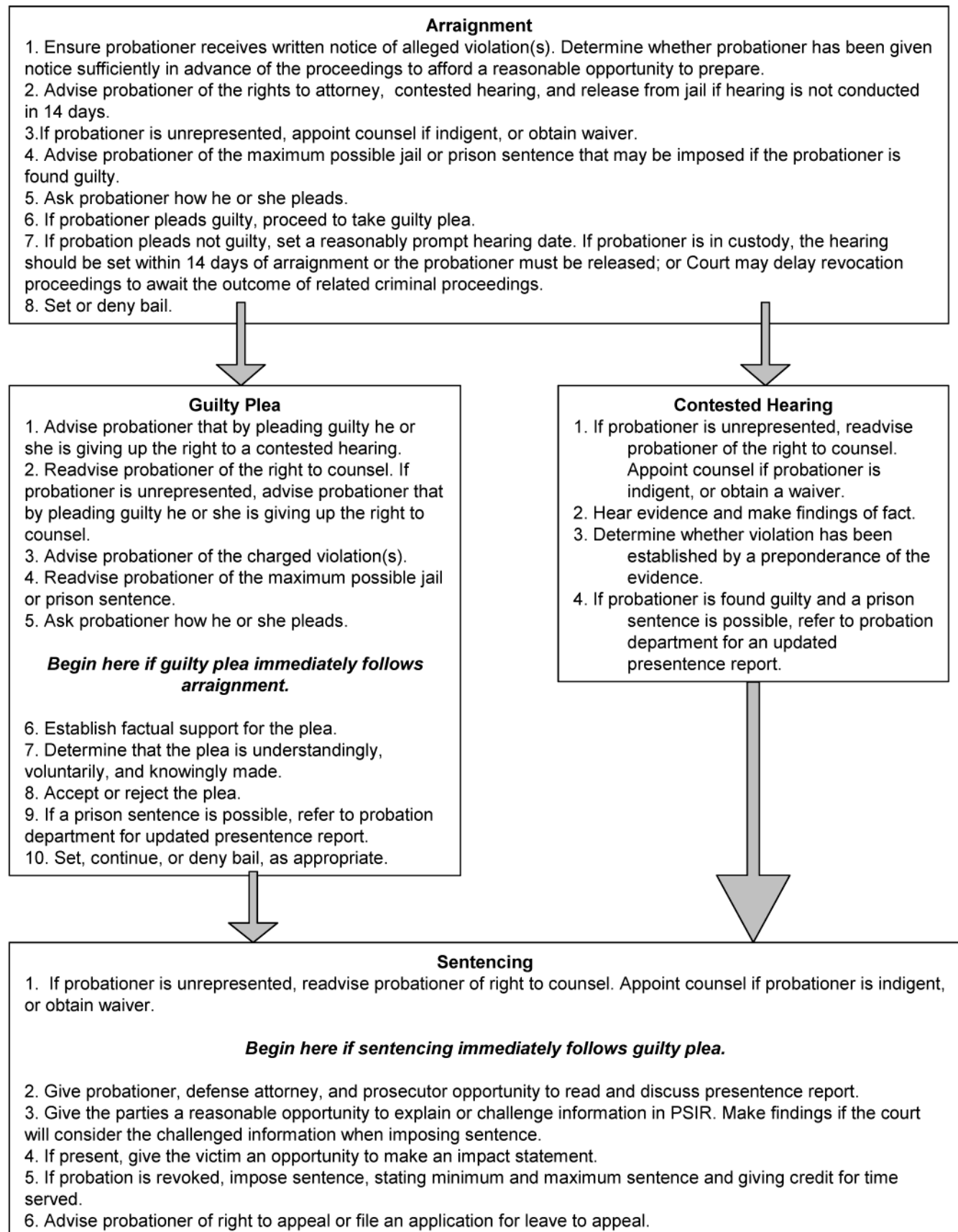
A “juvenile may appeal as of right from the imposition of a sentence of incarceration after a finding of juvenile probation violation.” MCR 6.933(D). But see *In re Madison*, 142 Mich App 216, 219 (1985) (in a juvenile delinquency case, the juvenile may not attack the order of disposition at a probation revocation hearing, and appeals following revocation of probation are limited to matters related to the revocation hearing).

## Part B—Quick Reference Materials

### 7.39 How to Use the Flowchart and Checklists

The flowchart and checklists refer to four separate stages of probation revocation proceedings: arraignments, plea proceedings, contested hearings, and sentencing hearings. We have adopted this approach because it is helpful for analytical purposes to clearly delineate the procedural safeguards required at each stage of the proceedings. This does not mean, however, that each of these proceedings occurs on a separate date. In many cases, all of these proceedings occur back-to-back on the same court date. For example, in some courts it is common practice for the probation officer to bring an updated presentence information report to the arraignment. The probationer and his or her attorney are given an opportunity to read the report and may, if they choose, plead guilty and be sentenced all on the same day. When this occurs, it is easy for the judge to overlook some of the necessary procedural steps unless he or she has a detailed set of checklists to consult. Thus, it is hoped that the following easy-to-read checklists will make errors of omission less likely.

## 7.40 Probation Revocation Flowchart





## **7.41 Checklist 1: Arraignment**

- ☐ 1. Ensure probationer receives written notice of alleged violation(s). Determine whether probationer has been given notice sufficiently in advance of the proceedings to afford a reasonable opportunity to prepare.
- ☐ 2. Advise probationer of the right to a contested hearing on the charges.
- ☐ 3. Advise probationer that he or she has the right to the assistance of an attorney, and that if he or she is financially unable to obtain an attorney but wants an attorney, the court will appoint one at public expense.
- ☐ 4. If probationer is unrepresented and indigent, appoint counsel. If probationer is not indigent, allow probationer a reasonable opportunity to obtain counsel if necessary.
- ☐ 5. Advise a probationer in custody that if the revocation hearing does not take place within 14 days after arraignment, he or she is to be released from custody pending the hearing.
- ☐ 6. Advise probationer of the maximum possible jail or prison sentence that may be imposed if the probationer is found guilty.
- ☐ 7. Ask probation how he or she pleads:
  - ☐ stand mute
  - ☐ not guilty
  - ☐ no contest
  - ☐ guilty
- ☐ 8. If probationer stands mute or pleads not guilty, set a reasonably prompt hearing date.
  - ☐ If probationer is in custody, the hearing should be set within 14 days of arraignment or the probationer must be released; or
  - ☐ Court may delay revocation proceedings to await the outcome of related criminal proceedings.
- ☐ 9. Set or deny bail.
- ☐ 10. If probationer pleads guilty or no contest, move to step 7 in checklist 2, Section 7.42, Guilty Pleas.





## 7.42 Checklist 2: Guilty Plea

- ☐ 1. Advise probationer that by pleading guilty he or she is giving up the right to a contested hearing.
- ☐ 2. Advise probationer of the right to counsel and the right to appointed counsel if probationer is indigent.
- ☐ 3. If probationer is unrepresented, advise probationer that by pleading guilty he or she is giving up the right to counsel.
  - ☐ Ask probationer to affirm that he or she does not want an attorney's assistance.
- ☐ 4. Advise probationer of the alleged probation violation(s).
- ☐ 5. Advise probationer of the maximum possible jail or prison sentence for the offense that led to probation.
- ☐ 6. Ask probationer how he or she pleads:
  - ☐ guilty
  - ☐ no contest

***Begin here if guilty plea immediately follows arraignment.***

- ☐ 7. Establish on the record factual support for finding that the probationer is guilty of a charged violation.
- ☐ 8. Determine and state for the record that the plea is understandingly, voluntarily, and knowingly made.
- ☐ 9. Accept or reject the plea.
- ☐ 10. If plea is accepted, schedule a date for sentencing or proceed to sentencing if in possession of an updated presentence report.
  - ☐ Unless it is certain that a prison sentence will not be imposed, refer probationer to probation department for preparation of updated presentence report.
- ☐ 11. Set, continue, or deny bail, as appropriate.



### 7.43 Checklist 3: Contested Hearing

- ☐ 1. If probationer is not represented by counsel, readvise probationer of the right to the assistance of an attorney, and that if he or she is financially unable to obtain an attorney but wants an attorney, the court will appoint one at public expense.
  - ☐ Ask probationer to affirm that he or she does not want an attorney's assistance; or
  - ☐ If counsel is requested, adjourn hearing and appoint counsel.
- ☐ 2. Hold revocation hearing at which:
  - ☐ The rules of evidence other than those with respect to privileges do not apply.
  - ☐ The court may consider only evidence that is relevant to an alleged violation.
  - ☐ All evidence against probationer is disclosed to probationer.
  - ☐ Probationer has right to appear, present evidence, and cross-examine witnesses.
  - ☐ The state must establish a probation violation by a preponderance of the evidence.
- ☐ 3. Make findings of fact.
- ☐ 4. On the record or in a written opinion made a part of the record, state separately the conclusion of law as to whether the charged violation(s) has/have or has/have not been established by a preponderance of the evidence, and direct entry of the appropriate judgment.
- ☐ 5. If the court finds that the probationer violated his or her probation, schedule a date for sentencing or proceed to sentencing if in possession of an updated presentence report.
  - ☐ Unless it is certain that a prison sentence will not be imposed, refer probationer to probation department for preparation of an updated presentence report.
- ☐ 6. Set, continue, or deny bail, as appropriate.



## 7.44 Checklist 4: Sentencing

- ☐ 1. If probationer is not represented by counsel, readvise probationer of the right to the assistance of an attorney, and that if he or she is financially unable to obtain an attorney but wants an attorney, the court will appoint one at public expense.
  - ☐ Ask probationer to affirm that he or she does not want an attorney's assistance; or
  - ☐ If counsel is requested, adjourn hearing and appoint counsel.

***Begin here if sentencing immediately follows guilty plea.***

- ☐ 2. If there is a presentence information report, give probationer, defense attorney, and prosecutor a reasonable opportunity to read and discuss the report.
  - ☐ A prison sentence may not be imposed without an updated presentence information report and compliance with the court rule governing sentencing.
- ☐ 3. Give the parties a reasonable opportunity to explain or challenge information in the presentence report.
- ☐ 4. If information in the report is challenged, apply a “preponderance of the evidence” standard and make a finding regarding the issue, or state that the challenged information will not be considered.
  - ☐ Correct or delete challenged information, if appropriate; and
  - ☐ Provide defense attorney an opportunity to review the corrected report before it is sent to the Department of Corrections.
- ☐ 5. Give the probationer, defense attorney, prosecutor, and victim, if present, an opportunity to make a statement.
- ☐ 6. Continue, modify, extend, or revoke probation.
  - ☐ If probation is revoked, impose sentence, stating minimum and maximum sentence.
  - ☐ If sentence is not within the guidelines range, articulate the substantial and compelling reasons justifying that departure.
- ☐ 7. Grant credit for time served.
- ☐ 8. If a sentence of incarceration is imposed, advise probationer that he or she has:
  - ☐ The right to appeal if the underlying conviction occurred as a result of a trial:  
or
  - ☐ The right to file an application for leave to appeal if the underlying conviction resulted from a guilty or nolo contendere plea.

- ☐ 9. If a sentence of incarceration is not imposed, advise the probationer that he or she has the right to file an application for leave to appeal.